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No. 86-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SECURITIES INDUSTRY ASSOCIATION,

Petitioner,

—v.—

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

This is the second time this case has reached the Court. It concerns the legality, under the Glass-Steagall Act, of banks' marketing new issues of corporate securities. The question initially presented was whether the instruments here, commercial paper, constitute "notes, or other securities" under the Act. Reversing the court below, the Court nullified a Federal Reserve Board ruling that commercial paper was outside the statute. *Securities Industry Association* v. *Board of Governors*, 468 U.S. 137 (1984).

In its opinion, the Court instructed that the Act is a statute of "flat prohibitions," admitting of "no" exception according to characteristics of either the specific securities or the particular investors involved. The Court rejected the Board's "subtle and ad hoc" analysis in that regard as well as its attempt, through related guidelines, to convert the Act into "a system of administrative regulation." The Court found the Act's concerns to be implicated "when a commercial bank has a pecuniary interest in promoting commercial paper."

Because the courts below had not reached the issue, however, the Court remanded the case for decision as to whether the marketing activites of the bank constitute "underwriting, selling or distributing" prohibited by the Act. The question thus now presented is:

Did the court of appeals err in upholding the Board's ruling on remand that the Glass-Steagall Act does not bar *these* securities activities, because they involve only sales of low risk securities to a limited number of institutional investors and, in light of new administrative "conditions" imposed by the Board, are "unlikely" to cause conceded conflicts and will impair just one of the Act's objectives?

PARTIES TO THE PROCEEDING

In addition to the petitioner* and respondents listed in the caption, the following are also respondents in this action: Paul A. Volcker as Chairman of the Board of Governors of the Federal Reserve System, Manuel H. Johnson, Martha R. Seger, Wayne D. Angell, and H. Robert Heller as Members of the Board of Governors of the Federal Reserve System, and Bankers Trust Company as Defendant-Intervenor.

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* Pursuant to Rule 28.1 of this Court, petitioner states as follows: The Securities Industry Association is a national trade association representing more than 500 securities brokers, dealers and underwriters who are responsible for over 90 percent of the securities brokerage and investment banking business in the United States.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Securities Industry Association ("SIA"), respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in this proceeding on December 23, 1986.

OPINIONS BELOW

The June 4, 1985 "Statement Concerning Applicability of the Glass-Steagall Act to the Commercial Paper Placement Activities of Bankers Trust Company" of the Board of Governors of the Federal Reserve System (76a)[1] is unreported. The opinion of the United States District Court for the District of

1 Citations herein to material printed in the Appendix appear as "___a".

Columbia nullifying the Board's Statement (45a) is reported at 627 F. Supp. 695. The opinion of the District Court for the District of Columbia enjoining Bankers Trust Company from further sales of third-party commercial paper in the manner described in the June 4, 1985 Statement of the Board (35a) is reported at 628 F. Supp. 1438. The Orders of the United States Court of Appeals for the District of Columbia Circuit staying the District Court injunction (33a) and extending the stay (32a) are unreported. The opinion of the Court of Appeals for the District of Columbia Circuit reversing the judgment of the District Court and reinstating the Board's determination (1a) is reported at 807 F.2d 1052.

JURISDICTION

The opinion of the Court of Appeals for the District of Columbia Circuit was entered on December 23, 1986. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Two sections of the Glass-Steagall Act are involved in this action.[2] Section 16 of the Act provides, in part:

> The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock. . . .

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2 What is generally referred to as the Glass-Steagall Act was enacted as part of the Banking Act of 1933, ch. 89, 48 Stat. 162, and is codified in various sections of Title 12 of the United States Code. Relevant to this action are sections 16 and 21 of the Act, 12 U.S.C. §§ 24 (Seventh) and 378. The terms of section 16, which expressly apply to national banks, are also made applicable to state member banks of the Federal Reserve System, such as Bankers Trust Company, by 12 U.S.C. § 335.

12 U.S.C. § 24 (Seventh). Section 21 of the Act provides, in part:

> [I]t shall be unlawful . . . [f]or any person, firm, corporation, association, business trust, or other similar organization, engaged in the business of issuing, underwriting, selling, or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of receiving deposits subject to check or to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor. . . .

12 U.S.C. § 378(a)(1).

STATEMENT OF THE CASE

A. Prior History of This Case

Nearly a decade ago Bankers Trust Company began marketing third-party commercial paper. It was the first commercial bank to do so in the half century since Congress enacted the Glass-Steagall Act—a "drastic" step taken by Congress to remove banks completely from marketing corporate securities. The SIA, on behalf of its member firms, petitioned the Board of Governors of the Federal Reserve System ("Board") to declare the activity contrary to law.

Nearly two years later, in 1980, the Board passed upon the SIA's petition, concluding that commercial paper should not be considered a "security" subject to the Act's prohibitions.[3] The Board found banks' sale of commercial paper unlikely to present any significant risks or conflicts of interest, because of its specific characteristics, such as large denominations, short maturity and relative safety. The Board, however, imposed guidelines (228a) to "minimize" the potential for abuse that admittedly existed. (*See* 230a, 254a). Having found commercial

3 *See* Federal Reserve System, Statement Regarding Petitions to Initiate Enforcement Action (1980) (235a).

paper exempt from the scope of Glass-Steagall's prohibitions, the Board considered it unnecessary to decide whether the bank's activities were the type proscribed by the Act. (253a).

The SIA immediately challenged the Board's ruling.[4] The district court nullified the ruling as contrary to law. 519 F. Supp. 602 (D.D.C. 1981) (202a). The court of appeals reversed, deferring to the Board's analysis, which it deemed "sufficiently reasonable" to accept. 693 F.2d 136 (D.C. Cir. 1982) (163a). The Court then granted review in light of the "importance of the issue to the Nation's financial markets," and reversed. 468 U.S. 137 (1984) (117a).

The Court explained the proper approach to application of the Glass-Steagall Act. The Act reflects Congress' choice of "a broad structural approach" operating "[t]hrough flat prohibitions . . . to 'separat[e] as completely as possible commercial from investment banking.' " 468 U.S. at 147 (127a; citation omitted). The Court therefore voided the Board's effort to narrow the scope of the statute by limiting the ordinary meaning of its prohibitions and by importing exemptions contained, not in the Glass-Steagall Act, but in the Securities Act of 1933, 15 U.S.C. §§ 77a, *et seq.*

The Court also admonished the Board for "misapprehend[ing] Congress' concerns with commercial bank involvement in marketing securities"—concerns derived from Congress' perception that "the role of a bank as a promoter of securities was fundamentally incompatible with its role as a disinterested lender and adviser." 468 U.S. at 154 (134a). As the Court put it (*id.* at 156; 136a):

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4 *Securities Industry Ass'n* v. *Board of Governors*, No. 80-2730 (D.D.C. filed Oct. 24, 1980). A.G. Becker, Incorporated, formerly a major dealer in commercial paper, commenced an action parallel to that brought by the SIA, *A.G. Becker, Inc.* v. *Board of Governors*, No. 80-2614 (D.D.C. filed Oct. 14, 1980), and the two cases were consolidated. The suit brought by A.G. Becker has since been dismissed on consent, and without prejudice, in light of its duplicative nature.

> By giving banks a pecuniary incentive in the marketing of a particular security, commercial-bank dealing in commercial paper . . . seems to produce precisely the conflict of interest that Congress feared. . . .

The Court remanded the case for specific decision as to whether the bank's activities constituted "issuing, underwriting, selling or distributing" within the Glass-Steagall Act, because the court below had not reached that issue. The proceedings on remand, of course, were to be "consistent with [the Court's] opinion." 468 U.S. at 160 (140a). Thereafter, the circuit court remanded the case to the district court, which, in turn, referred it to the Board.

B. Administrative Proceedings on Remand

The Board chose not to engage in any further fact-finding about the bank's activities beyond obtaining a carefully written statement from bank counsel and allowing comments from interested parties. (78a-79a). The bank's new submission to the Board confirmed that, like other commercial paper underwriters, it assists issuers in placing their paper with large institutions—the bank advises issuers with respect to the rates, maturities and size of a proposed offering, solicits potential purchasers, and actively promotes the purchase of paper.[5]

The Board nevertheless concluded that the bank's activity was not prohibited "underwriting, selling, or distributing" securities for purposes of the Glass-Steagall Act. (76a; 109a). It acknowledged that the bank's activity was within the literal scope of the prohibition upon "selling" securities in Section 21 of the Act. The Board, however, found the activities were permissible because, it concluded, they fall within a narrow

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5 The bank did promise in its statement to the Board to stop its prior practice of issuing letters of credit to back paper it promoted and to stop its practice of buying any part of an issue it was unable to place with third parties. (79a-80a).

exception in Section 16 of the Act that permits limited bank "dealing" in securities. (82a-90a).[6]

Further, in the Board's view, the bank is not engaged in prohibited "underwriting" or "distributing" because it does not conduct "widespread public promotion" of the securities it sells. (*See* 109a). Analogizing to the express exemption for so-called "private offerings" in the Securities Act of 1933, the Board considered that selling securities to "a limited number of institutional purchasers," should also be exempt from the prohibitions of the Glass-Steagall Act. *Id.* (*See* 91a-99a).

The Board reached these conclusions even though it determined that the marketing activities *do* involve potential Glass-Steagall conflicts of interest and other hazards, some of which were "of particular concern" to it. (103a). The Board found this potential sufficiently minimized, however, by various "conditions" and an administrative "framework" imposed in its new ruling. (*See* 85a-86a; 111a). The Board dismissed other conceded hazards as "unlikely," in light of a variety of definitional factors written into its authorization, including the nature of the security sold, the number and type of investors in it, and the marketing and solicitation practices followed. (99a-108a).

C. District Court Decision on Remand

After the Board's ruling, both the SIA and the Board filed cross-motions for summary judgment before the district court. (46a). Bankers Trust intervened in the proceeding, and it too

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6 The exception in Section 16 provides: "The business of dealing in securities and stock by the association shall be limited to selling such securities and stock, without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock." 12 U.S.C. § 24 (Seventh).

The Board concluded that the bank here sells securities "only as an agent of the issuer," the securities are sold "without recourse against the bank" and are sold "solely on the order of its customer, the issuer of the paper." (83a).

moved for summary judgment. *Id.* Following the admonitions of the Court in its prior review of this case, the district court concluded in an extensive opinion that the bank's activities violate the Glass-Steagall Act, and again nullified the Board's ruling. 627 F. Supp. 695 (D.D.C. 1986) (45a).

The district court agreed that "[t]here can be no dispute that Bankers Trust 'sells' commercial paper on behalf of issuers, and that its activities are therefore embraced by the literal terms of section 21, which broadly prohibits banks from 'selling' securities." 627 F. Supp. at 699 (51a). The court rejected the Board's attempt to "shoehorn" the bank's activities into the narrow "dealing" exception contained in Section 16, which, it concluded, simply describes securities brokerage. *Id.* at 703 (58a; 65a). Here, by contrast, the bank actively promotes new issues of specific securities in the primary market—a "wholly different" activity from the securities brokerage permitted by Section 16 in the secondary market. *Id.* (59a).[7] Thus, by its effort to fit the bank's new issues activity into Section 16, the Board had attempted to transform "a narrow exception addressed to a completely different activity into an expansive authorization that defeats the prohibition intended." *Id.* at 702 (56a).

The district court also rejected the Board's "attempt to superimpose the private placement exemption of the securities laws onto the Glass-Steagall Act" as "simply inconsistent with the Act's purpose." 627 F. Supp. at 711 (73a). As the court recognized, "the hazards which prompted passage of that Act are just as likely to occur in sales to private institutions as in sales to the general public." *Id.* at 709 (69a). Indeed, the court found that "[t]he bank's flotation of securities in the primary

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7 The district court explained that, unlike a typical broker, the profitability of the bank's securities activity hinges upon the "sale of a *particular* security" and that the bank therefore "most definitely" has a "salesman's stake" in the securities it sells, because it earns its fee based on its success in placing a given issue, and its ability to attract new customers depends upon its success in marketing its customer's securities. 627 F. Supp. at 703 (58a-59a).

market is replete with precisely those pernicious promotional pressures that Congress sought to eliminate from the commercial banking industry." *Id.* at 706 (65a).

Finally, the district court rejected the Board's effort either to minimize some of the hazards in the bank's activities through "conditions" and administrative "framework" or to dismiss others as "unlikely" because of the particular securities involved. In the district court's judgment, the Board had thereby transformed the Act's "clear statutory commands into sliding scale prohibitions" directly contrary to the instruction of the Court. *Id.* at 711 (73a).[8]

D. Court of Appeals Decision on Remand

The court of appeals reversed and reinstated the Board's ruling as not "unreasonable." 807 F.2d 1052 (D.C. Cir. 1986) (1a). The court concluded that the limited exception in Section 16 for "dealing" in securities did not have to be restricted to secondary market brokerage activity but rather, as the Board had found, *could* also apply to selling new securities issues in the primary market. The circuit court also deferred to the Board's conclusion that the bank is not "underwriting" in violation of the Act. The court recognized that the term "underwriting" includes agency activities, as here, but concluded such activities arguably could be considered not to involve "underwriting" so long as no "public offering" of securities is involved. *Id.* at 1062 (17a-18a).

In the latter respect the court of appeals reasoned that the Securities Act of 1933 specifically exempts private offerings from its registration requirements and that the Glass-Steagall Act could similarly be construed, even though it does not

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8 After the District Court's decision on the illegality of its conduct, Bankers Trust publicly announced that it would continue its commercial paper activities. The district court thereupon granted the SIA's motion for further injunctive relief prohibiting the bank from continuing its distribution of commercial paper. *See* 628 F. Supp. 1438 (D.D.C. 1986) (35a). The Court of Appeals stayed the effect of this injunction pending its decision on appeal. (33a; 32a).

contain an express "public" versus "private" distinction. The court was willing to accept that Congress "might have drawn" such a line in the Glass-Steagall Act, noting Congress' concern with "the large fixed costs that accompanied *retail* participation in public distributions." *Id.* at 1066 (25a) (emphasis supplied). The court suggested Congress might have been willing to allow the "relatively minor expenses" the court assumed were involved in making private placements to institutional purchasers. *Id.* The court did not address the language in Section 21 of the Act that expressly bars banks from selling securities at "retail" *or* "wholesale".

The court below regarded any hazards analysis under Glass-Steagall "at odds" with the Court's recent opinion in *Board of Governors* v. *Dimension Financial Corp.*, 106 S. Ct. 681 (1986). It acknowledged, however, that "[u]ntil the Court indicates that it no longer employs this analysis to interpret the Glass-Steagall Act" (*id.* at 1067; 26a) it, too, must take hazards considerations into account. It then agreed with the Board that most of the dangers presented were "unlikely" or sufficiently minimized, given restrictions imposed by the Board and the characteristics of the commercial paper market. *Id.* at 1069-70 (31a). (*See* 100a; 108a; 109a).

However, the court of appeals recognized that this Court had "clearly rejected" the Board's dismissal of conflicts of interest inherent in sales to institutional depositors. 807 F.2d at 1069 (30a). Still, the court was of the view that an activity must involve "each and every one" of the hazards identified by the Court before it becomes impermissible under the Act. *Id.* (31a). The court therefore deferred to the Board, stating that an interpretation which only "impairs one of the statute's purposes" may nevertheless "surely . . . be reasonable." (*Id.*)

REASONS FOR GRANTING THE WRIT

I.

THE OPINION BELOW RAISES IMPORTANT ISSUES OF NATIONAL SIGNIFICANCE

The Board's ruling here affects the entire financial services industry, although this case derives from the activities of one bank. The Board, as affirmed by the court below, has effectively sanctioned marketing of any new issue of corporate securities by all commercial banks—a circumstance unprecedented since Congress imposed the Glass-Steagall prohibitions fifty years ago.

The issue addressed by the Court earlier in this case was whether commercial paper constitutes "securities," which banks are prohibited from marketing under the Glass-Steagall Act. That issue, itself, raised fundamental questions concerning proper interpretation of the Act, leading the Court to grant the SIA's previous petition for certiorari "[b]ecause of the importance of the issue for the Nation's financial markets." 468 U.S. at 142 (122a). If anything, the issue decided upon remand and now before the Court upon this petition is of even greater urgency and widespread significance.

First, the legal issue raised is in no way restricted to commercial paper. The question now is what marketing activities banks may undertake with Glass-Steagall impunity, regardless of the securities involved. If permitted to stand, the ruling in effect permits all 14,000 banks in the country to market *any* type of new issue—from junk bonds to speculative stocks—in the manner initiated by Bankers Trust. The impact of the Board's ruling is staggering. The SIA estimates the market in commercial paper alone to approach nearly one trillion dollars a year

in offerings.[9] In addition, the most recent data available show that, in 1985, so-called "private placements" accounted for more than one-third of the total sales of *all* new issues of corporate debt and equity sold in this country.[10] And, this would be permitted to banks despite the unchanged and unqualified prohibitions enacted by Congress to separate commercial and investment banking as completely as possible.

Second, the Board's ruling raises fundamental questions concerning the respective roles of administrative agencies and of Congress in setting national policy. By affirming the Board, the court below effectively sanctioned an administrative effort to redraft the Glass-Steagall prohibitions, even though Congress has consistently refused to accord the Board any rule-making authority under the Act. During several recent terms, including the present one, Congress has been considering major legislative proposals that, if enacted, would materially alter the existing regulatory framework governing financial institutions. Although it has enacted other major reforms to the federal banking laws,[11] Congress to date has repeatedly declined to modify existing restrictions on bank securities activities. The one clear message Congress has sent, however, is that the plain terms of the Glass-Steagall Act are *not* to be changed administratively.[12]

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9 *See* Statement of the Securities Industry Association by Jeffrey M. Schaefer, submitted to the Board of Governors of the Federal Reserve System, *In the Matter of the Applications of Citicorp, J.P. Morgan & Co., Inc., and Bankers Trust New York Corp. to Engage in Underwriting and Dealing through Subsidiaries* ("*Underwriting Applications*"), January 29, 1987, at 9.

10 Dealers Digest Inc., IDD Information Services, Private Placement Database (1985).

11 *See, e.g.*, Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (1982); Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (1980).

12 As the Court observed earlier in this case, as recently as 1980, Congress authorized the Comptroller of the Currency to issue rules and regulations but "expressly continued to withhold from the Comp-

Obviously under increasing pressure from the institutions they regulate, the Board and other bank regulators simply have begun to dismantle the Glass-Steagall Act through administrative "interpretation." If allowed to stand, the opinion below unquestionably will impel that process. The Board, for example, recently authorized bank affiliates to begin marketing commercial paper, based in part upon the ruling below authorizing such conduct for banks. *Bankers Trust New York Corp.*, 73 Fed. Res. Bull. 138 (1987). The Board also held public hearings on February 3, 1987 concerning applications by three of the nation's largest bank holding companies to establish securities affiliates that would underwrite and deal in billions of dollars of other securities as principal, not merely as agent. *See* Federal Reserve System, Order for Hearing Before the Board, *Underwriting Applications*, *supra* at n.9, December 31, 1986. Again, the opinion below is cited as a basis for approving the new activity.[13] Given the ominous implications of these applications, the Chairman of the Senate Banking, Housing and Urban Affairs Committee wrote the Board to make clear his view that "approval of the applications would involve a major reversal of policy that can only be effected by Congress."[14]

National policy, of course, is to be set by legislative deliberation and not by administrative edict. Any shift in the statutory

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troller the authority to issue regulations concerning 'securities activities of National Banks under the Act, commonly known as the "Glass-Steagall Act." ' " 468 U.S. at 154 (134a) (quoting Depository Institutions Deregulation and Monetary Control Act of 1980, § 708, 94 Stat. 188, 12 U.S.C. § 93a).

13 Joint Legal Memorandum of Citicorp, J.P. Morgan & Co., Inc., and Bankers Trust New York Corp., *Underwriting Applications*, *supra* n.9, January 30, 1987, at 22-23.

14 Letter from Senator William Proxmire to the Honorable Paul A. Volcker (Jan. 30, 1987), *reprinted in American Banker*, February 3, 1987, at 1, 3. The letter also stated that "the clear and overriding intent of Congress in enacting the Glass-Steagall Act was to prohibit banks from underwriting ineligible securities, whether directly or through affiliates." The letter stated flatly that "the applications at issue here fly in the face of that congressional intent." *See id.* at 1.

boundaries between the securities and banking industries involves a policy decision that should be legislated by Congress, because only it can weigh all the considerations involved. As the Court has put it, policy determinations "must be implemented by Congress, and not by a crabbed [administrative] interpretation of the words of the statute. . . ." *BankAmerica Corp.* v. *United States*, 462 U.S. 122, 133 (1983).

Third, the decision below raises a very real question about the efficacy of the Court's own decisions. In its initial opinion *in this case*, the Court in considerable detail reviewed the purpose, structure and application of the Glass-Steagall Act. It admonished the Board that the terms of the statute are flat prohibitions that are not to be diluted either by *ad hoc* statutory analysis or by administrative regulation. Nevertheless, the Board repeated essentially the same rationale on remand. Again, it adopted an *ad hoc* definitional approach and imposed administrative conditions, by reason of which it found the activities "lawful". (*See* Point II, *infra*.) And, once again, the Board's rationale has been affirmed by the court of appeals. Review thus is warranted, if for no other reason, to make clear that the Court did, and does, mean what it has said concerning the scope and enforcement of the Glass-Steagall Act.

The Glass-Steagall Congress would have been astonished to find its prohibitory legislation recast beyond recognition by administrative action—particularly when it had expressly rejected a regulatory approach in drafting the law. 468 U.S. at 153-54 (133a-134a). Further action by the Court is essential to resolve fundamental issues concerning both the scope of activities permitted to banks under federal law and the manner in which regulation of financial institutions is to be conducted.

II.

THE OPINION BELOW CONFLICTS WITH THE PRIOR DECISION OF THE COURT IN THIS CASE AND RAISES SUBSTANTIAL QUESTIONS OF FEDERAL LAW

The Court remanded this case for further proceedings "consistent with [its] opinion." 468 U.S. at 160 (140a). The conclusions reached by the Board on remand, however, are anything but "consistent" with what the Court had directed.

A. The Court's Prior Construction of the Act as a Statute of Flat Prohibition

The Court made clear that, through the Glass-Steagall Act, Congress mandated "a broad structural approach that . . . [t]hrough flat prohibitions . . . sought to 'separat[e] as completely as possible commercial from investment banking.' "[15] In light of the Act's unequivocal terms and remedial purpose, the Court instructed the Board that it was *not* to "narrow the ordinary meaning of the statutory language" or "depart[ ] from the literal meaning of the Act." 468 U.S. at 152-53 (132a-133a). Yet, the Board again did just that.

First, the Board contorted the ordinary meaning of Section 16 of the Act, upon which it solely relied, to sanction the activities at issue. The activities here comprise selling of new issues of securities in the primary market. The Section 16 language cited by the Board, however, permits only "*dealing*" in securities to the limited extent of "purchasing and selling . . . without recourse, solely upon the order, and for the account of, customers." 12 U.S.C. § 24 (Seventh).

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15 468 U.S. at 147 (127a) (*citing Board of Governors* v. *Investment Co. Institute*, 450 U.S. 46, 70 (1981)). The Court had earlier made clear that the Glass-Steagall Act was passed as "a prophylactic measure directed against conditions that the experience of the 1920's showed to be great potentials for abuse." *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 639 (1971) ("*ICI*"). Congress viewed it as a necessary, "drastic step." *Id.* at 629.

"Dealing" is a term that ordinarily connotes activities in the secondary, or trading, market for securities and not activities, such as underwriting, in the primary market. *See* II L. Loss, *Securities Regulation* 1215 (2d ed. 1961). Section 16, itself, expressly draws the distinction between "dealing" in securities, which it permits to a limited degree, and "underwriting" securities, which it prohibits entirely. As the Court has explained, the Section 16 exception accurately describes "securities brokerage," a secondary market activity. *Securities Industry Association* v. *Board of Governors*, 468 U.S. 207, 219 n.20 (1984) ("*Schwab*").

Moreover, the language of Section 16 relied upon by the Board is an *exception* to the Act's otherwise broad prohibitions, and it is well established that exemptions in remedial statutes "should be narrowed and limited to effect the remedy intended." *Piedmont & N.R. Co.* v. *ICC*, 286 U.S. 299, 311 (1932). *See also Port of New York Authority* v. *Baker, Watts & Co.*, 392 F.2d 497, 504 (D.C. Cir. 1968) wherein Judge Tamm observed, rejecting another attempt to read the exceptions in Section 16 expansively, "[e]xceptions in a remedial statute must be narrowly construed." Accordingly, any possible ambiguity in the Section 16 exception for "dealing" should have been resolved as narrowly as possible. The Board did just the opposite.[16]

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16 Similarly, the court below, not disputing that the term "dealing" typically relates to the secondary market, concluded that a securities "dealer" as defined in the Securities Act of 1933 *could* participate in the primary market and therefore held that the term should not be "restricted" to secondary market activities. 807 F.2d at 1059 (11a-12a). Not only did the court thereby violate basic rules of statutory construction, but it apparently misunderstood the Securities Act, on which it supported its view. That statute contains a "dealers exemption" from its registration requirements for transactions in the trading market. 15 U.S.C. § 77d(3). If someone who is ordinarily a dealer participates in a new offering, however, he is deemed an "underwriter" and is no longer covered by the "dealers exemption" for purposes of that transaction. *Id.* Congress, in short, drew the same kind of distinction between "dealing" and "underwriting" in the Securities Act as is apparent on the face of Section 16 in the Glass-Steagall Act.

The Board also ignored what the Court has said about the legislative history of Section 16's "dealing" exception. The committee reports accompanying the Act, the Court has noted, explained that the exception was intended to permit banks "to purchase and sell investment securities for their customers *to the same extent as heretofore*." S. Rep. No. 77, 73d Cong., 1st Sess. 16 (1933). *See also* H.R. Rep. No. 150, 73d Cong., 1st Sess. 3 (1933); *Schwab*, 468 U.S. at 215 n.13. Prior to the Glass-Steagall Act, however, bank involvement in commercial paper with rare exception had been only "in the role of discounter." 468 U.S. at 160 (140a). And, as the Court also pointed out, " 'discounting' commercial paper is not part of the 'business of dealing' in securities" as the term is used in Section 16. *Id.* at 158-59 n.11 (138a-139a). Plainly, Congress did not intend to sanction bank marketing of commercial paper as the Board has permitted.

Second, while expanding the exception for "dealing" in Section 16 to permit banks to market new issues of securities, the Board simultaneously narrowed the prohibition in Section 21 against banks "selling" and/or "underwriting" them. The Board did so by reading into Section 21 of the Act the exemption for "private offerings" that Congress wrote into the Securities Act of 1933. To accomplish this result, however, the Board ignored what even the dissenters had said earlier in this case concerning the differing purposes of the two statutes:

> The purposes of the banking and securities laws are quite different. The Glass-Steagall Act was designed to protect banks and their depositors. . . . The securities laws were designed more generally to protect investors and the general public.

468 U.S. at 175 (155a) (O'Connor, J., dissenting).

The Securities Act protects the investing public by requiring full and fair disclosure through registration statements and prospectuses, but it equally exempts from those burdensome disclosure requirements situations "where there is no practical need" or "where the public benefits are too remote." H.R. Rep. No. 85, 73d Cong., 1st Sess. 5 (1933). The Securities Act

thus makes it unlawful for any person to "sell" or effect a "sale" of securities in interstate commerce unless a registration statement for them is in effect (15 U.S.C. § 77e) but expressly exempts from that requirement transactions "not involving any public offering." 15 U.S.C. § 77d(2). As the Court has explained concerning this exemption, found in Section 4(2) of the Act:

> The natural way to interpret the private offering exemption is in light of the statutory purpose. Since exempt transactions are those as to which "there is no practical need for [the bill's] application," the applicability of § 4[(2)] should turn on whether the particular class of persons affected needs the protection of the Act. *An offering to those who are shown to be able to fend for themselves is a transaction "not involving any public offering."*[17]

The Glass-Steagall Act, by contrast, insulates banks and their depositors from the financial risks and/or conflicts of interest inherent in combining investment with commercial banking. The Act flatly prohibits banks from "selling" and/or "underwriting" corporate securities, completely without regard to the ability of sophisticated investors to "fend for themselves." The Court put it succinctly earlier in this case (468 U.S. at 159; 139a):

> In its prohibition on commercial-bank underwriting, the Act admits of no exception according to the particular investment expertise of the customer. *The Act's prohibition on underwriting is a flat prohibition that applies to sales to both the knowledgeable and the naive.*

(Emphasis supplied). And, the Court further observed (*id.* at 156; 136a):

> To the extent that a bank sells commercial paper to large bank depositors, the result of a loss of confidence in the

17 *SEC* v. *Ralston Purina Co.*, 346 U.S. 119, 124-25 (1953) (emphasis supplied).

bank [upon the default of the issuer] would be especially severe.

In short, the Securities Act exemption permitting unregistered sales of new issues to sophisticated investors is utterly irrelevant, if not inimical, to the Glass-Steagall prohibitions.[18] And, the Board's attempt to engraft the exemption onto the Glass-Steagall Act has no more substance than its similar effort, already rejected by the Court, to read the Securities Act exemption for commercial paper into the unqualified terms "notes, or other securities" of the Glass-Steagall Act. 468 U.S. at 151-52 (131a-132a).[19]

The court below deferred to the Board's current ruling, however, because the court found it "highly plausible" that Congress "might have drawn a line" in the Glass-Steagall Act between private and public offerings. 807 F.2d at 1066 (25a). The line was plausible because, in the court's view, Congress particularly wanted banks to avoid any pressure to support the heavy "fixed burden" of a "far-flung *retail* network to distrib-

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18 The court below apparently misunderstood the operation of the private offering exemption within the Securities Act. The court discussed it (807 F.2d at 1063-64; 20a-21a) in the context of the terms "underwriter" and "distribution." The exemption, however, simply negates the registration requirements of the Securities Act that otherwise apply to any "sale" of new issues of securities, regardless of whether a "distribution" or "underwriting" is technically involved.

19 The Board's ruling on remand actually reversed its own previously expressed view concerning the Act's application to so-called private placements. In *First Arabian Corp.*, 63 Fed. Res. Bull. 66 (1977), the Board denied the request of a bank holding company to retain an interest in a securities broker-dealer that placed securities as agent with large institutional customers, but did not sell to the general public. Citing similar prior rulings by the Comptroller of the Currency, the Board said (*id.* at 69):

> [S]uch a middleman role "lies at the heart of the investment banking business". . . . It is precisely this promotional interest of the investment banker that the Glass-Steagall Act intended to separate from the commercial banker's interest in acting as an impartial source of credit and providing impartial investment advice.

ute securities to the public" (*id.*, emphasis supplied). But the language of the Act itself belies the court's supposition. It expressly prohibits all selling, whether "*at wholesale or retail*, or through syndicate participation. . . ." 12 U.S.C. § 378 (emphasis supplied). Quite obviously Congress' concern extended far beyond the costs of "*retail* participation in public distributions." 807 F.2d at 1066 (25a) (emphasis added). It expressly chose *not* to draw exactly the "line" the Board has now inscribed in the statute.

The court below was also completely inconsistent in its view concerning the relevance of investor sophistication to the Glass-Steagall Act. The court recognized in its hazards analysis that this Court had held "the Act makes no distinctions on the basis of financial expertise." 807 F.2d at 1069 (30a-31a). Accordingly, the circuit court refused to accept the Board's hazards analysis based on that factor. *Id.* (*See infra* at 24). Yet, the determinative distinction between best efforts underwritings, which the court conceded were prohibited (*id.* at 1062 n.3; 18a), and "private offerings," which the court permitted, is the financial expertise of the investors involved—exactly the distinction the court recognized in its hazards analysis, the Act does *not* make.

In sum, the Board, affirmed by the court of appeals, again departed from the ordinary meaning of the Act's language, reading in exceptions not written into it by Congress, and ignoring the relevant legislative history. The Board thereby "turned the statute on its head." *See* 627 F. Supp. at 704 (60a). Again, review of the decision below is warranted.

B. The Court's Prior Rejection of a Regulatory Application of the Act

The Court left no doubt either about the congressional objective underlying the Glass-Steagall Act or about its application to marketing commercial paper. Congress was convinced that "the role of a bank *as a promoter* of securities was fundamentally incompatible with its role as a disinterested

lender and adviser." 468 U.S. at 154 (134a) (emphasis supplied). And, the Act's concerns are directly implicated "when a commercial bank has a pecuniary interest in promoting commercial paper." *Id.* at 155 (135a). The Court catalogued any number of conflicts of interest inherent in just those circumstances.[20]

The Court was equally clear that the Act requires prohibition, not mere regulation, of the activities it covers. Although the approach was "not without costs in terms of efficiency and competition," Congress determined to enact "a strong prophylaxis." 468 U.S. at 148 (128a). The Court repeated the point (*id.* at 147; 127a):

> Congress rejected the view of those who preferred legislation that simply would regulate the underwriting activities of commercial banks. Congress chose instead a broad structural approach [of] . . . *flat prohibitions.*

(Emphasis supplied). And, underscoring "Congress' refusal to give the Board any rulemaking authority over the activities prohibited by the Act" (*id.* at 154; 134a), the Court reiterated

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20 For example:

—"[B]anks might use their relationships with depositors to facilitate the distribution of securities in which the bank has an interest, and that the bank's depositors might lose confidence in the bank if the issuer should default on its obligations . . . [which] concern would appear fully applicable to commercial-paper sales." 468 U.S. at 155-56 (135a-136a).

—"By giving banks a pecuniary incentive in the marketing of a particular security, commercial-bank dealing in commercial paper also seems to produce precisely the conflict of interest that Congress feared would impair a commercial bank's ability to act as a source of disinterested financial advice." *Id.* at 156 (136a).

—The conflict of interest "becomes especially acute if a bank decides to distribute commercial paper on behalf of an issuer who intends to use the proceeds of the offering to retire debt that the issuer owes the bank." *Id.*

—"[A bank] may feel pressure to purchase unsold notes in order to demonstrate the reliability of its distribution system, even if the paper does not meet the bank's normal credit standards." *Id.* at 155 (135a).

in no uncertain terms that "*Congress rejected a regulatory approach when it drafted the statute, and it has adhered to that rejection ever since.*" *Id.* at 153 (133a) (emphasis supplied).

Based upon this analysis, the Court voided the Board's initial statutory approach in this case. The Board had looked to non-statutory market factors to read commercial paper out of the statute and had promulgated "guidelines" to minimize conflicts admittedly inherent in the bank's activity. Through this "subtle and *ad hoc*" analysis, the Court held, the Board had "effectively convert[ed] a portion of the Act's broad prohibition into a system of administrative regulation", directly contrary to the congressional mandate. 468 U.S. at 153 (133a). Yet, remarkably, the Board constructed the same kind of regulatory "system" upon remand.

First, the Board again looked to the economic "realities" of the commercial paper market to conclude this activity was not covered by the Act. In so doing, the Board again applied a host of definitional factors nowhere found in the Glass-Steagall Act—just the sort of "nebulous inquiry" the Court rejected in nullifying the Board's earlier "departure from the literal meaning of the Act."[21] As the Court then bluntly stated, the Act's prohibition upon selling and underwriting "displays *no* appreciation for the features of a particular issue" and "admits of *no* exception according to the particular investment expertise of the customer." 468 U.S. at 157, 159 (137a, 139a) (emphasis supplied).

Second, the Board made clear its intention to continue adapting the Act's prohibitions on a case-by-case basis. It stated that "any significant change in the structure or opera-

21 468 U.S. at 153 (133a). The factors used by the Board on remand in fact were largely the same as those it used to exempt commercial paper from the term "securities" in the Act initially. The Board's current factors included the nature of the security sold; the type of investor; the number of investors; the marketing and solicitation practices followed; and the size of the minimum purchase involved in the transaction. (*See* 91a-108a).

tions of the recognized commercial paper market might change the Board's views" (101a n.38; 109a) and that, by "marketing securities to an ever-broadening class of customers, the character of the offering eventually could change from non-public to public and the provisions of the Act could then apply." (98a-99a). As the district court observed, the Board's ruling converted the Act's "clear statutory commands into sliding scale prohibitions necessitating guidelines and agency oversight. . . ." 627 F. Supp. at 711 (73a).

Indeed, the Board conceded the existence of potential conflicts of interest "of particular concern" to it. (103a). Yet, instead of prohibiting the activities, the Board imposed various "conditions" as well as an administrative "framework" and concluded the activities would be lawful "if conducted within the limitations" imposed.[22] Though not formally labeled "guidelines," the Board's extra-statutory "limitations" were unmistakable earmarks of just the regulatory regime the Court rejected.[23]

Third, the Board brushed off other conceded conflicts of interest as "unlikely" or "not significant," in light of the commercial paper market. (101a-109a). But, as the Court has made clear, the Act precludes potential and not simply proven risks. The Act addressed the " 'imperfection of human nature,' " and sought to remove even the "temptation[s]" for

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22 (85a-86a; 101a-109a). For example, the Board restricted banks' granting lines or letters of credit related to issues of commercial paper they market. (85a-86a).

23 The limitations were unquestionably important to the Board's ruling. Chairman Volcker, for example, was prepared to concur in the ruling, as he put it, "*only* because the Board required application of these standards. . . ." (111a) (emphasis supplied). Further, the Board plainly did not intend to limit the restrictions solely to Bankers Trust; rather, as it stated to the district court, all "*other banks* performing the same placement services" would be subject to administrative sanctions if they failed to conform to the limits. *See* Memorandum of Points and Authorities in Support of Defendants' Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment, August 9, 1985, at 40, n.46 (filed in the district court).

conflicts of interest inherent in combining commercial with investment banking, no matter how subtle. 468 U.S. at 147 (127a) (citing 75 Cong. Rec. 9912 (1932) (remarks of Sen. Bulkley)). Its prohibition "reflects Congress' conclusion that *the mere existence* of a securities operation, 'no matter how carefully and conservatively run, is inconsistent with the best interests' of the bank as a whole." *Id.* at 157 (137a) (quoting 75 Cong. Rec. 9913 (1932) (remarks of Sen. Bulkley)) (emphasis supplied).

The Court therefore repeatedly focused on conflicts of interest that "might" arise from banks' marketing commercial paper (*see* n.20, *supra*), not conflicts deemed "likely", "substantial" or proven by any other measure.[24] As the district court put it on remand, by "regulating the most immediate promotional incentives and dismissing the more subtle as unlikely or insignificant," the Board violated the directive of the Court and the congressional intent on which it was based. 627 F. Supp. at 706 (65a).

The "hazards" analysis of the court below equally contravened the admonition of the Court. The court of appeals deferred to the Board's rationale concerning some of the " 'potential' conflicts," because the court viewed the market "realities" concerning *commercial paper* as making the "potential for conflict substantially unlikely." 807 F.2d at 1067-68 (28a).[25] Yet, the activities the Act prohibits have nothing to do

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24 In *ICI*, too, the Court repeatedly cited "potential" conflicts that "might" arise, noting that Congress sought to eliminate even that potential. *ICI*, 401 U.S. at 637-38.

25 In that respect, for example, the court below concluded:

—banks are unlikely to lend money to shore up companies whose commercial paper they market because "the profit from the placement of *commercial paper* is small" so that the loan would not be worth the risk (807 F.2d at 1068; 28a);

—banks are unlikely to sell commercial paper for a company to repay a bank loan because companies otherwise unable to repay

with the particular security involved, be they junk bonds or commercial paper. As noted, the prohibitions display "*no* appreciation for the features of a particular issue". 468 U.S. at 157 (137a) (emphasis supplied).

Even the court below, however, agreed this Court had "clearly rejected" the Board's attempt to argue away admitted conflicts of interest on the basis of the business sophistication of investors in commercial paper. 807 F.2d at 1069 (30a-31a). Nevertheless, concluding that the Court requires a practice to be voided only when it gives rise to "each and every one of the hazards" previously identified, the circuit court deferred to the Board's interpretation, finding it "may surely . . . be reasonable" because it "impairs" only "one of the statute's purposes." *Id.* Both the premise and the conclusion of this remarkable conclusion, however, fly right in the face of the Court's Glass-Steagall analysis and Congress' intent.

The Court's analysis plainly is not a mere checklist of problems to be minimized by regulatory oversight until the Court, as the opinion below suggests, "indicates that it no longer employs this analysis to interpret the Glass-Steagall Act." 807 F.2d at 1067 (26a). The Court's analysis confirms Congress' objective *flatly* to prevent the possibility for *any* conflicts of interest. Certainly, a regulatory ruling that admittedly "impairs" that congressional purpose in any respect cannot in any way be "reasonable." At the very least the existence, as here, of conceded conflicts of interest should resolve any possible ambiguity in the statute against the activity involved.

In short, the Board reinstituted exactly the "system of administrative regulation" (468 U.S. at 153; 133a) the Court

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their loan would "probably be unable to raise money in the *commercial paper* market" (*id.*, 29a); and

—banks are unlikely to make loans to prospective purchasers of the commercial paper they are selling because "yields on *commercial paper* are generally lower" than the interest charged on prime bank loans. *Id.* (emphasis supplied).

has nullified under the Act. The Board again imposed guidelines ("conditions" and "framework") despite the Court's admonition that such a "*regulatory* response to the potential problems" had been rejected by Congress "when it drafted the statute, and . . . ever since." *Id.* (emphasis supplied). If permitted to stand, the Board's administrative ruling will have converted the Glass-Steagall wall into a regulatory filagree through which any number of securities activities, prohibited by Congress, easily may pass. For this reason, too, the decision below warrants review.

CONCLUSION

For the foregoing reasons, the requested Writ of Certiorari should issue.

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